

1 THE HONORABLE JOHN C. COUGHENOUR
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LANCE P. MCDERMOTT,

11 Plaintiff,

v.

12 MEGAN BRENNAN, United States
13 Postmaster General, and UNITED STATES
14 POSTAL SERVICE,

15 Defendants.

CASE NO. C19-0714-JCC

ORDER

16 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 26).

17 Having considered the parties' briefing¹ and the relevant record, the Court hereby GRANTS the
18 motion for the reasons explained herein.

19 **I. BACKGROUND**

20 Plaintiff is a former employee of Defendant United States Postal Service ("USPS"). (*See*
21 Dkt. No. 1-1 at 6.) Because Plaintiff is partially colorblind, USPS allegedly restricted the work
22 Plaintiff could do. (*See id.* at 11.) Plaintiff claims that he asked his manager to remove those
23 restrictions, but his manager denied the request on March 6, 2017, causing Plaintiff to lose
24

25 ¹ The Court hereby GRANTS Plaintiff's motion for an extension of time to file a response to
26 Defendant's motion to dismiss (Dkt. No. 17). The Court will consider Plaintiff's response in
ruling on Defendants' motion.

1 overtime. (*See id.* at 23.) Plaintiff also alleges that in April 2017, Plaintiff’s manager picked
2 Plaintiff to paint parking lots in retaliation for a complaint Plaintiff filed in December 2012 about
3 the hostile environment at his work. (*See id.*) While painting on July 20, 2017, Plaintiff allegedly
4 injured his back. (*See id.*)

5 On August 14, 2017, Plaintiff submitted a request for pre-complaint counseling with the
6 Equal Employment Opportunity Commission (“EEOC”) about the two incidents in March and
7 April 2017. (*Id.* at 23.) The EEOC concluded that Plaintiff’s request was untimely. (*See id.* at
8 15–16.) Consequently, the EEOC dismissed Plaintiff’s complaint on August 24, 2018. (*See id.*)

9 On November 19, 2018, Plaintiff filed a “Request for Judicial Review” of the EEOC’s
10 decision in King County Superior Court. (*Id.* at 3.) Defendants subsequently removed the case,
11 (Dkt. No. 1 at 2), and they now move to dismiss on the basis that Plaintiff submitted his request
12 for pre-complaint counseling more than 45 days after the alleged discrimination occurred. (*See*
13 Dkt. No. 26 at 6–7.)

14 **II. DISCUSSION**

15 Federal anti-discrimination laws² require claimants to follow an array of “claim-
16 processing rules” prior to filing suit. *See Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846
17 (2019); 29 C.F.R. §§ 1614.104–110. One of those rules is that “[a]n aggrieved person must
18 initiate contact with a Counselor within 45 days of the date of the matter alleged to be
19 discriminatory.” 29 C.F.R. § 1614.105(a)(1). To determine when the 45-day clock began to run,
20

21 ² Defendants assume that Plaintiff raises claims under Title VII. (*See Dkt. No. 26 at 3*) (citing
22 Dkt. No. 1-1 at 8–9). However, Plaintiff alleges that USPS discriminated against him because of
23 his colorblindness and retaliated against him because he filed a complaint about how USPS was
24 treating him due to his colorblindness and bad back. (*See Dkt. No. 1-1 at 9.*) These allegations
25 appear to be claims under the Americans with Disabilities Act, not Title VII. *See* 42 U.S.C.
26 §§ 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of
disability”), 12203(a) (“No person shall discriminate against any individual because such
individual opposed any act or practice made unlawful by this chapter”). That said, the basis
for Plaintiff’s claims is not material to the Court’s decision because the pre-complaint processing
rules are the same for the ADA and for Title VII. *See* 29 C.F.R. § 1614.105(a).

1 a court must look to “the time of the *discriminatory acts*, not . . . the time at which the
2 *consequences* of the acts became most painful.” *Del. State Coll. v. Ricks*, 449 U.S. 250, 257
3 (1980) (emphasis in original) (quoting *Abramson v. Univ. of Hawaii*, 594 F.2d 202, 209 (1979));
4 *Branch v. McDonald*, 2015 WL 7874763, slip op. at 6–7 (N.D. Cal. 2015) (measuring 45-day
5 time period from the day an employer denied an employee’s request for an accommodation
6 instead of from the day the employee was forced to retire). If a claimant does not contact a
7 counselor within 45 days of the alleged discriminatory acts, then a court must ordinarily dismiss
8 any subsequent lawsuit.³ See *Cherosky v. Henderson*, 330 F.3d 1243, 1245 (9th Cir. 2003).

9 In this case, Plaintiff did not file his request for pre-complaint counseling within 45 days
10 of the two discriminatory acts that he alleges. The first act occurred on March 6, 2017, when
11 Plaintiff’s manager allegedly denied Plaintiff’s request to remove his work restrictions. (See Dkt.
12 No. 1-1 at 23). The second act occurred in April 2017 when Plaintiff’s manager allegedly
13 assigned Plaintiff to the menial task of painting parking lots. (See *id.*) Yet, Plaintiff did not
14 request counseling regarding either act until August 14, 2017. (See *id.*) Plaintiff’s request was,
15 therefore, untimely.

16 Plaintiff disagrees, arguing that the date of the second act should be measured from when
17 he injured his back. (See Dkt. No. 27 at 10.) However, Plaintiff’s back injury is merely a
18 consequence of his manager’s alleged retaliatory decision to assign Plaintiff to paint parking lots.
19 The 45-day clock therefore began running on the date of the alleged retaliation, not the date at
20 which the consequences of that retaliation became most painful. See *Ricks*, 449 U.S. at 257;
21 *Branch*, 2015 WL 7874763, slip op. at 6–7. Because the alleged retaliation occurred more than
22 45 days before Plaintiff filed his request for pre-complaint counseling, (see Dkt. No. 1-1 at 23),

23 ³ The Ninth Circuit has long held that the time limit for contacting an EEO counselor functions
24 “as a statute of limitations and is subject to waiver, estoppel and equitable tolling.” *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 415 (9th Cir. 1985). In addition, 29 C.F.R. § 1614.105(a)(2) lists
25 circumstances in which the 45-day time limit can be extended. However, Plaintiff does not argue
26 that waiver, estoppel, equitable tolling, or any of the other exceptions listed in 29 C.F.R.
§ 1614.105(a)(2) apply. (See generally Dkt. No. 27.)

1 his request was untimely, 29 C.F.R. § 1614.105(a)(1).

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court GRANTS Plaintiff's motion for an extension of time
4 (Dkt. No. 17), GRANTS Defendants' motion to dismiss (Dkt. No. 26), and DISMISSES
5 Plaintiff's complaint with prejudice. The Court also DENIES as moot Plaintiff's motions to
6 consolidate cases (Dkt. No. 21, 38), motion to amend (Dkt. No. 22), motion for default judgment
7 (Dkt. No. 28), and motion for joinder (Dkt. No. 29).

8 DATED this 13th day of April 2020.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



John C. Coughenour
UNITED STATES DISTRICT JUDGE